A

JOHN LO THAU FAH

v.

FACB RESORTS BHD

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NO: S-02-221-2008]

C

12 SEPTEMBER 2011

CONTRACT: *Breach - Action for damages - Failure of respondent to honour terms of contract - Whether respondent liable - Whether counterclaim that contract was invalid null and void valid - Contracts Act 1950, ss. 24, 25, 30, 31, 75 - Civil Law Act 1956, s. 26 - Evidence Act 1950, ss. 91 and 92 - Companies Act 1965, s. 136*

D

The appellant ('John Lo') had sued the respondent ('FACB') in the High Court for damages for breach of contract. FACB had counter-claimed for a declaration that the contract was invalid, null and void for contravening ss. 24, 25, 30 and 31 of the Contracts Act 1950, s. 26 of the Civil Law Act 1956 and s. 136 of the Companies Act 1965. John Lo's claim was based on a letter to him ('P6') from FACB which stated that: (i) in consideration, *inter alia*, of his acceptance to join FACB's subsidiary, Karambunai Resorts Sdn Bhd (KRSB) as Executive Deputy Chairman and payment of RM1, FACB would offer him one million shares in KRSB (ii) the RM1 consideration was acknowledged as having been paid (iii) the shares were to be made available to him within 30 days of the date of submission of an Initial Public Offering (IPO) of KRSB to the Stock Exchange of Singapore (iv) if the IPO exercise was for any reason unsuccessful or not implemented before the end of the year 2000, FACB would pay him Singapore $1m in cash *in lieu* of the KRSB shares and (v) KRSB and/or FACB would bear any tax payable on either the transfer to him of the KRSB shares or the payment to him of the S$1m.

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John Lo accepted the offer in P6, resigned from all posts he had held with the Kuok Group of Companies and joined KRSB as its Executive Deputy Chairman. However, FACB failed to make available to him the one million shares it held in KRSB and the IPO exercise was not implemented before the end of the year

I

2000. John Lo demanded payment of the S$1m as agreed in P6 but when FACB failed to pay the sum, he resigned from KRSB and filed the suit claiming for RM2.223m being the Ringgit equivalent of S$1m as at 2 January 2001, the day following the date when payment became due and payable under P6, with interest. The High Court dismissed the claim and the counterclaim. John Lo appealed the decision to the Court of Appeal and FACB cross-appealed.

Held (unanimously allowing the appeal, dismissing the cross-appeal, setting aside the High Court's decision, granting judgment to the appellant as prayed for in the statement of claim with interest at 8% per annum from 1 January 2001 till date of payment plus RM20,000 as costs for the proceedings in the Court of Appeal and below)
Per Hishamudin Mohd Yunus JCA:

(1) The High Court erred in holding that P6 was a wagering contract and hence unenforceable by reason of s. 31 of the Contracts Act 1950 and s. 26 of the Civil Law Act 1956; that the terms of P6 were uncertain to constitute a binding contract and that FACB's obligation to pay John Lo S$1m *in lieu* of KRSB shares if the IPO did not take place, was a penalty under s. 75 of the Contracts Act 1950. (paras 26, 31 & 37)

(2) FACB had not pleaded the existence of any collateral contract. It was therefore not open to FACB by oral evidence, now, to allege the making of representations by John Lo with a view to varying or adding to the terms of the agreement in P6 which was in writing and signed by the parties. Evidence of the alleged representations was inadmissible by reason of ss. 91 and 92 of the Evidence Act 1950. (paras 47-49)

(3) The question of the contract offending s. 136 of the Companies Act 1965 did not arise as John Lo was never a director of FACB. Section 136 only applied to income tax-free payments made by a company to its own director. (para 52)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, perayu ('John Lo') telah membuat tuntutan terhadap responden ('FACB') kerana pelanggaran kontrak. FACB menuntut balas untuk deklarasi bahawa kontrak adalah batal dan tak sah kerana melanggar ss. 24, 25, 30 dan 31 Akta Kontrak

A 1950, s. 26 Akta Undang-Undang Sivil 1956 dan s. 136 Akta Syarikat 1965. Tuntuan John Lo adalah diasaskan kepada surat yang dihantar oleh FACB kepadanya ('P6') yang menyatakan bahawa: (i) sebagai balasan, antara lain, kepada penerimaannya untuk bekerja dengan anak syarikat FACB, Karambunai Resorts B Sdn Bhd (KRSB) selaku Timbalan Pengerusi Eksekutif dan bayaran RM1, FACB akan menawarkan satu juta saham di dalam KRSB (ii) balasan RM1 tersebut disah sebagai telah diterima (iii) saham-saham akan diserah kepadanya dalam tempoh 30 hari dari tarikh Initial Public Offering (IPO) KRSB dikemukakan kepada Bursa C Saham Singapura (iv) jika urusan IPO atas apa-apa sebab gagal atau tidak dilaksanakan sebelum akhir tahun 2000, maka FACB akan membayarnya 1 juta dolar Singapura tunai sebagai ganti saham-saham KRSB, dan (v) KRSB dan/atau FACB akan menanggung segala cukai yang perlu dibayar sama ada berkaitan D pemindahan saham KRSB atau pembayaran 1 juta dolar Singapura kepadanya.

John Lo menerima tawaran di dalam P6, meninggalkan segala jawatan yang dipegang di dalam Kumpulan Syarikat Kuok dan E bekerja dengan KRSB sebagai Timbalan Pengerusi Eksekutif. Bagaimanapun, FACB gagal menyerahkan kepadanya sejuta saham yang dipegangnya di dalam KRSB dan urusan IPO telah tidak dilaksanakan sebelum akhir tahun 2000. John Lo menuntut bayaran 1 juta dolar Singapura yang dipersetujui di dalam P6, F tetapi, apabila FACB gagal membayar jumlah tersebut, telah berhenti kerja dengan KRSB dan sekaligus menuntut sejumlah RM2.223 juta, nilai Ringgit untuk S$1 juta setakat 2 Januari 2001, iaitu sehari selepas hari di mana bayaran menjadi tertunggak dan kena bayar di bawah P6, beserta dengan faedah. Mahkamah Tinggi G menolak tuntutan dan tuntutan balas. Berikutnya John Lo merayu terhadap keputusan Mahkamah Rayuan sementara FACB merayu balas.

Diputuskan (membenarkan rayuan, menolak rayuan balas, mengenepikan keputusan Mahkamah Tinggi, memberi H **penghakiman kepada perayu seperti tuntutan dalam penyata tuntutan dengan faedah pada kadar 8% setahun dari 1 Januari 2001 hingga tarikh pembayaran dan kos RM20,000 untuk prosiding di Mahkamah Rayuan dan di bawah)**
Oleh Hishamudin Mohd Yunus HMR:

I

(1) Mahkamah Tinggi khilaf dalam memutuskan bahawa P6 adalah suatu kontrak pertaruhan dan kerana itu tidak boleh dikuatkuasakan disebabkan oleh s. 31 Akta Kontrak 1950 dan s. 26 Akta Undang-Undang Sivil 1956; bahawa tiada kepastian

pada terma-terma P6 bagi menjadikannya suatu kontrak yang mengikat dan bahawa obligasi FACB untuk membayar John Lo S$1 juta sebagai ganti saham KRSB jika IPO tidak berlaku, adalah suatu penalti di bawah s. 75 Akta Kontrak 1950.

(2) FACB tidak memplid kewujudan sebarang kontrak kolateral. Oleh itu adalah tidak terbuka kepada FACB melalui keterangan lisan, untuk mengatakan sekarang bahawa John Lo telah melakukan misrepresentasi demi untuk mengubah atau menokok tambah terma perjanjian di dalam P6 yang berbentuk tulisan tersebut dan ditandatangani oleh pihak-pihak. Keterangan mengenai misrepresentasi yang didakwakan adalah tidak boleh diterima-masuk berdasarkan ss. 91 dan 92 Akta Keterangan 1950.

(3) Persoalan sama ada kontrak melanggari s. 136 Akta Syarikat 1965 tidak berbangkit oleh kerana John Lo tidak pernah menjadi pengarah FACB. Seksyen 136 hanya terpakai kepada bayaran-bayaran yang terlepas dari percukaian yang dibuat oleh sesebuah syarikat kepada pengarah-pengarahnya sendiri.

Cases referred to:
Ashmore v. Corp of Lloyd's [1992] 2 All ER 486 ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***
Carlill v. Carbolic Smoke Ball Co [1892] 2 QB 484 ***(refd)***
Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] CLJ (Rep) 186 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 25, 30, 31, 75
Civil Law Act 1956, s. 26
Companies Act 1965, s. 136
Evidence Act 1950, ss. 91 and 92

For the appellant - Mau Kam Peng; M/s Mau & Kadir
For the respondent - Marina Tiu (Noraihan Mohd Ali with her); M/s Yap Chin & Tiu

Reported by Ashok Kumar

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This appeal and cross-appeal before us are against the decision of the learned Judicial Commissioner of the High Court of Sabah and Sarawak at Kota Kinabalu given on 17 January

A 2008. The learned judicial commissioner, in his decision, had dismissed the plaintiff's claim (the plaintiff is now the appellant before us) as well as the defendant's counter-claim (the defendant is now the respondent before us).

B **[2]** The cross-appeal by the respondent/defendant is in respect of the dismissal of the respondent's/defendant's counter-claim.

[3] We have allowed the appellant's/plaintiff's appeal and have dismissed the respondent's/defendant's cross-appeal.

C **[4]** We now give our grounds.

[5] The appellant's claim is for damages for breach of contract on the part of the respondent.

D **[6]** The respondent in its counter-claim is seeking a declaration that the contract is invalid, null and void by reason of contraventions of the provisions of the Contracts Act 1950, the Civil Law Act 1956 and the Companies Act 1965.

Facts Of The Case

E

[7] The appellant's claim is based on a letter (exh. P6) dated 22 November 1999 written by one Tan Sri Chen Lip Keong (Tan Sri Chen), the Chief Executive Officer and President of the respondent company (FACB), to the appellant. This letter reads:

F

FACB Resorts Berhad
8 Lorong P. Ramlee
50250 Kuala Lumpur,
Malaysia
Tel (603)2012377
Fax (603)2015272

G

Our Ref: CEO/cy/PPSB/001/11.99
Date: 22 November 1999

Mr. John Lo
H **Perlis Plantation Sdn Bhd**
Bangunan BFO, 2nd Floor
88999 Kota Kinabalu
Sabah

Dear Mr. Lo,

I

Junior-Senior Partnership Incentives

1. In consideration of your acceptance to join Karambunai Resorts Sdn Bhd (hereinafter referred to as KRSB) as Executive Deputy Chairman and our mutual understanding and undertaking to cooperate with each other in order to develop tourism in Sabah, I would like to offer the following incentives as described herein for your kind acceptance.

2. I have raised the issue of an IPO exercise of KRSB on the Singapore Stock Exchange and also would like to take this opportunity to make an offer of 1 (one) million KRSB shares (hereinafter referred to as the "said KRSB shares") subject to the following terms and conditions.

The said KRSB shares shall be offered by FACB Resorts Berhad for RM1 consideration, the receipt is hereby acknowledged.

The said KRSB shares shall be made available to you within 30 days from the date of submission of an IPO exercise by DBS Merchant Bank of Singapore to the Stock Exchange of Singapore.

In the event that the IPO exercise of KRSB is not successful or implemented for whatsoever reasons before end 2000, FACB Resorts Berhad shall pay you SGD 1 million (Singapore Dollars One Million Only) in cash, in lieu of offer of the said KRSB shares.

KRSB and/or FACB Resorts Berhad shall bear all tax charges, if any, resulting from the transfer of the said KRSB shares in favour of you and/or the payment of cash SGD 1 million to you.

This letter supersedes the letter dated 15 November 1999.

Accepted by

t.t.	t.t.
Tan Sri Dr Chen Lip Keong President/Chief Executive Officer	John Lo IC No. 450513-12-5369

[8] It can be seen that by the above letter (exh. P6) it was agreed between the appellant and the respondent that:

(a) the respondent, FACB Resorts Bhd (FACB) offered to the appellant one million FACB's shares in Karambunai Resorts Sdn Bhd (KRSB) at the total consideration of RM1, which offer was accepted by the appellant by the latter making the

payment of RM1; and the respondent had acknowledged receiving the RM1 from the appellant. The KRSB shares, being accepted, were to be made available to the appellant within 30 days from the date of submission of an Initial Public Offer (IPO) exercise by DBS Merchant Bank of Singapore to the Stock Exchange of Singapore; and

(b) should the IPO exercise be not successful or not implemented for whatsoever reason before the end of the year 2000, the respondent must pay the appellant a sum of Singapore Dollars S$1,000,000 in cash, *in lieu* of the said KRSB shares.

[9] As events turned out:

(a) the respondent failed to make available to the appellant the one million shares it held in KRSB; and

(b) the IPO exercise was not implemented before the end of the year 2000.

[10] Accordingly, by virtue of the agreement, the sum of S$1,000,000 became due and payable by the respondent to the appellant on 1 January 2001, *in lieu* of the KRSB shares.

[11] On 5 August 2002, by a letter (exh. P13) addressed to Tan Sri Chen as CEO of the respondent, the appellant demanded the payment of S$1,000,000 pursuant to the contract as per the letter of 22 November 1999 (exh. P6).

[12] The respondent, however, failed or refused to pay this sum to the appellant.

[13] On 1 October 2002, the appellant resigned from KRSB. The respondent company (FACB) accepted the resignation. On 19 November 2002 the respondent on the instruction of Tan Sri Chen, the CEO of the respondent, wrote to the appellant (see exh. P15) thanking the latter for his 'great contribution towards the Group'.

[14] 1 January 2001 was a public holiday. On the next day, 2 January 2001, the Ringgit Malaysia equivalent of S$1,000,000 was RM2,223,000.

[15] The appellant filed his writ and statement of claim on 25 February 2003.

[16] It is the contention of the appellant that the above letter, which had been signed by both parties, constitutes a binding contract between the parties.

[17] The letter, exh. P6, was an inducement by the respondent company (in particular, by Tan Sri Chen, the CEO cum President of the respondent company) to the appellant to join KRSB as its Executive Deputy Chairman. The appellant had accepted the offer. He had resigned from all the posts he held with the Kuok Group of companies and joined Karambunai Resorts Sdn Bhd (KRSB) as its Executive Deputy Chairman on 15 December 1999.

[18] KRSB is a subsidiary of the respondent company.

[19] The IPO exercise was undertaken by Tan Sri Chen and the entities under his control. Both Tan Sri Chen and the appellant were very keen on the IPO exercise. The exact mechanism of the IPO exercise, which involved the submission by DBS Merchant Bank of Singapore to the Stock Exchange of Singapore, is, however, not explained in the pleadings or the evidence. Be it in the pleadings or in the evidence, neither the appellant nor the respondent takes a firm or clear position as to whether the IPO exercise was a case of it being 'not successful' or whether it was a case of it being 'not implemented'. Be that as it may, it is, however, common ground that the IPO exercise was not implemented before the end of the year 2000.

Broad Issues

[20] It is the contention of the appellant that the failure to pay the appellant Singapore Dollars S$1,000,000 (or its equivalent in Malaysian Ringgit) in lieu of the KRSB shares, since the IPO exercise was not implemented, amounts to a breach of contract on the part of the respondent.

[21] The appellant is claiming the sum of RM2,223,000 being the Ringgit Malaysia equivalent of Singapore Dollars S$1,000,000 as at 2 January 2001 (this is the next day following the date when payment became due and payable under the contract ie, 1 January 2001). The appellant is also claiming interests.

[22] The respondent on its part, in resisting the appellant's claim, raises several issues in the statement of defence and counter-claim including alleging that the contract as per the letter exh. P6 is

A invalid by reason of ss. 24, 25, 30 and 31 of the Contracts Act 1950, s. 26 of the Civil Law Act 1956, and s. 136 of the Companies Act 1965. Accordingly, as said earlier, in the prayers to the counter-claim, the respondent seeks a declaration to the effect that the contract is invalid and is of no legal effect.

B

[23] On the issue of damages, the respondent also raises the issue of penalty clause, invoking s. 75 of the Contracts Act.

[24] Considering the merits and the number of issues raised by the learned counsel for the respondent, at the outset we are C impelled to remind learned counsel for the respondent of what was said by Lord Templeman in *Ashmore v. Corp of Lloyd's* [1992] 2 All ER 486, 493:

> It is the duty of counsel to assist the judge by simplification and D concentration and not advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every E point conceivable and inconceivable without judgment or discrimination.

[25] We shall now allude to some of the issues that arise in this appeal, one by one.

F **Wagering Contract**

[26] In our judgment, we accept the contention of the learned counsel for the appellant that the learned judicial commissioner, with respect, had erred when he held that the contract as per the letter of 22 November 1999 (exh. P6) is a wagering contract and G hence unenforceable by reason of s. 31 of the Contracts Act 1950 and s. 26 of the Civil Law Act 1956. Section 26 of the Civil Law Act 1956 provides:

> **Agreement by way of gaming or wagering to be null and void**
>
> H 26. (1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void.
>
> (2) No action shall be brought or maintained in any court for recovering any sum of money or valuable thing alleged to be won I upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.

[27] Section 31 of the Contracts Act 1950 provides: A

> **Agreements by way of wager void**
>
> 31. (1) Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made. B

[28] We observe that neither the Civil Law Act nor the Interpretation Acts 1948 and 1967, or the Contracts Act, defines the term 'wagering contract'. However, in the landmark case of *Carlill v. Carbolic Smoke Ball Co* [1892] 2 QB 484 Hawkins J C defined 'wagering contract' as (at p. 490):

> A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that D event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting party having any other interest in that contract than the sum of stake he will win or lose, there being no other real consideration for the making of such contract by either of the E parties.

[29] Guided by the above definition, and bearing in mind that the legal burden of establishing that in fact and in law the letter exh. P6 is a wagering contract lies on the respondent, we are of the view that clearly the respondent has failed to discharge that F burden. We so hold because, firstly, the respondent has neither pleaded nor adduced any evidence to the effect that the appellant and the respondent hold two opposite views on the success/implementation of the Initial Public Offer (IPO) exercise (assuming for a moment that the success/implementation of the G IPO exercise is a future uncertain event). On the contrary, it is in evidence that both the appellant and the respondent had an interest in the IPO exercise: they both had desired the IPO exercise to be successful/implemented. In this regard, on the matter of pleading, we wish to allude to para. 9(iii) of the H statement of defence and counter-claim. It is to be noted that what has been averred is merely:

> iii. The agreement contained in the said letter is an agreement by way of a wager within the meaning of section 26 of the Civil Law Act 1956 and/or section 31 of the Contracts Act 1950. I

[30] Clearly, the above pleading is meaningless as it is lacking in material particulars. Upon examining the above paragraph, the pertinent question is: In what way is the agreement 'by way of a wager'? Secondly, it is neither pleaded nor any evidence adduced to state that the implementation of the IPO exercise is a future uncertain event. In this regard, the pertinent question to ask is: In what way is the outcome of the IPO exercise an uncertain event? The respondent stresses on the fact that the IPO exercise did not materialize. But in our view the fact that the IPO exercise was not implemented cannot be a sufficient basis for the respondent to contend that the IPO exercise was a future uncertain event. More needs to be shown. In the first place the respondent has failed to explain either in the pleading or in its evidence the mechanism of the IPO exercise: as a matter of law and practice, how does one go about in having a company listed on the Stock Exchange of Singapore? Thirdly, apart from the S$1million consideration payable to the appellant by the respondent (in the event that the IPO exercise was not successful/not implemented) *in lieu* of the KRSB shares, there is also the other real consideration in the making of the contract: the appellant's joining KRSB as its Executive Deputy Chairman.

Uncertain Terms

[31] In our judgment, we accept the submission of the appellant that the learned judicial commissioner, with respect, had erred in law when he ruled that the terms of the agreement are uncertain as to constitute a binding contract. In so ruling the learned judicial commissioner had referred to s. 30 of the Contracts Act. This section provides:

> **Agreement void for uncertainty**
>
> 30. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

[32] The learned counsel for the respondent, in his written submission, in support of the finding of the learned judicial commissioner, argues that the uncertainty lies in that part of the letter (exh. P6) that reads:

> ... and our mutual understanding and undertaking to cooperate with each other in order to develop tourism in Sabah.

[33] Learned counsel argues that the terms of the contract are 'incomplete'. On our part, we are in agreement with the appellant's submission that the respondent is estopped from raising this argument in the light of the respondent's conduct and admission of liability as manifested by the respondent's two letters to the appellant, namely, exhs. P18 and P19.

[34] First, we shall deal with exh. P18. After the appellant had resigned from KRSB, by a letter dated 23 December 2002 (and this is exh. P18), from the respondent to the appellant, written and signed by one Mr Eric Tay, the respondent's Chief Financial Officer and Chief Operating Officer (who was also a certified public accountant), the respondent offered to sell a company car to the appellant for RM154,000; but in this letter it is also stated that:

> Should you accept the Offer, the purchase consideration of RM154,000.00 shall be offset/contra against obligations due to you by FACB Resorts Berhad.

[35] Subsequently, by another letter dated 31 December 2002 (and this is exh. P19), still on the same subject of making an offer to the appellant to purchase the vehicle in question, the respondent admitted the amount due to the appellant 'as per' the letter exh. P6. By this letter (exh. P19) from the respondent to the appellant, also written and signed by the said Mr Eric Tay, the respondent admitted:

> Should you accept the Offer, the purchase consideration of RM154,000.00 shall be offset/contra against amount due to you as per FACB Resorts Berhad letter dated 22 November 1999 (reference: CEO/cy/PPSB/001/11.99).

[36] By reason of the above conduct and admissions of liability on the part of the respondent, it is now unconscionable for the respondent to deny liability and to raise the issue of incomplete or uncertain terms; and, accordingly, the respondent is estopped from raising such an issue (see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283).

Penalty Clause

[37] In our judgment, we accept the submission of the learned counsel for the appellant that the learned judicial commissioner, with respect, had erred when he ruled that the contract (letter exh. P6) contains a penalty clause: the respondent's obligation to

pay the appellant S$1,000,000 *in lieu* of KRSB shares in the event the IPO exercise was either not successful or not implemented. Section 75 of the Contracts Act provides:

> **Compensation for breach of contract where penalty stipulated for**
>
> 75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of a breach, or if the contracts contains any other stipulation by way of a penalty, the party complaining of the breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[38] With respect we do not consider the payment of S$1,000,000 to be a penalty. Firstly, it is to be appreciated that the payment of S$1,000,000 was not solely because of the non-implementation of the IPO exercise: it was also meant to be in lieu of the 1 million FACB's KRSB shares which the appellant was entitled to have anyway under the contract, having, earlier, paid the respondent the agreed consideration of RM1. Now, this sum of S$1,000,000 was not arbitrarily determined; nor plucked out of sheer generosity on the part of the respondent. This sum had been carefully worked out by the parties and it co-relates to their estimation of the value of the KRSB shares. This is borne out by the evidence of Tan Sri Chen himself when he said in his further witness statement at para. 8(l), (m) and (n) (see p. 163-164 appeal record, part 1):

> (l) We computed that for the IPO exercise, a price earnings ratio of 12 is acceptable based on the high price earning ratio (p/e) of 30 to 40 enjoyed by the hospitality industry in the market. Based on the average earnings for the years 1997 to 1999 of RM35 million and the agreed p/e of 12, the valuation of KRSB for the IPO exercise would be RM420 million (RM35 million x 12) because the hospitality industry do command a good p/e of 30 to 40.
>
> (m) The plaintiff had then asked that his reward or incentive should include a percentage of the agreed value of RM420 million to be paid by the issue of IPO shares of KRSB upon listing. The percentage to be given to him was set at 0.5% which would translate to around RM2.1 million.
>
> (n) The letter exhibit P3 [Enclosure 155 page 4] was drawn up between us and signed.

[39] In other words, the sum of S$1,000,000 relates to the value of the 1,000,000 KRSB shares that should have been transferred to the appellant upon the submission of the IPO exercise to the Stock Exchange of Singapore, had the respondent performed the contract, that is to say, had the respondent ensured that the DBS Merchant Bank of Singapore submitted the IPO exercise to the relevant Singapore authority. Thirdly, we also note that for the respondent to now assert that the obligation to pay the S$1,000,000 is a 'penalty' is contrary to the position taken by the respondent when giving evidence that the payment was meant to be 'remuneration'. At para. 11 of Tan Sri Chen's Further Witness Statement (see p. 163 of the appeal record (Part 1)) Tan Sri Chen had said:

> ... I must stress that the **remuneration** stated in exhibit P6 (Enclosure 155 page 8) is always subject to the Plaintiff performing and fulfilling what he had promised and represented he would do. (emphasis added)

No Valuable Consideration

[40] In our judgment, with respect, we disagree with the finding of the learned judicial commissioner that there is no valuable consideration flowing from the appellant to the respondent under the contract. As required by the contract, the appellant had joined KRSB as it Executive Deputy Chairman. He has also paid the RM1 for the 1,000,000 KRSB shares as required and confirmed by the contract. These are the considerations under the contract.

Representations

[41] In the present case there is the contention by the respondent that Tan Sri Chen signed the letter exh. P6 based on representations made by the appellant to the respondent; and that the appellant had failed to honour those representations. The representations are as set out in para. 2 of the amended statement of defence and counter-claim. They are:

> (1) He shall be able to convince the Government of Sabah or the relevant authorities to grant the necessary approvals to make the vision of Borneo Resort Karambunai (comprising but not limited to the living museum of Borneo, cultural village, water park, animal park, including the Orang Utan sanctuary) a reality and spearhead its planning, financing and development;

(2) He shall be able to convince the existing tourism school in Kota Kinabalu to enter into a joint venture with the Karambunai Resorts Sdn Bhd (hereinafter referred to as 'KRSB') to set up a tourism college for KRSB for which there is already an existing market and clientele in the form of current or future employees of all the various private or governmental tourism related companies or bodies, and he shall be able to convince all these organizations to enroll their people in the tourism college;

(3) He shall be able to secure new flights into Sabah from other airlines and secure additional and cheaper flights into Sabah from existing airlines;

(4) He shall be able to attract overseas investments into Karambunai to build and develop more tourist attractions and destinations;

(5) He shall set up a travel agency for KRSB and also secure more tourist arrivals to Karambunai;

(6) He shall be able to secure on behalf of KRSB the necessary approvals for the property development known as Bukit Sierra at Mile 13, Jalan Tuaran, Kota Kinabalu and to spearhead the property development;

(7) He shall be able to devote all his time and energy to KRSB as he has absolutely no interests whether direct or indirect in any whatsoever tourism related companies or ventures; and

(8) He shall be able to provide the leadership required to achieve all the above objectives and make Karambunai a major tourist destination on par with the international destinations such as Bali, Phuket, Hawaii and Cancun.

[42] According to the respondent's submission, the above representations are summed up in the letter exh. P6 by the words 'our mutual understanding and undertaking to cooperate with each other in order to develop tourism in Sabah'.

[43] It is not stated in the statement of defence and counter-claim as to whether the above (alleged) representations were made orally or in writing by the appellant. It is also not stated in the pleading as to when and where the alleged representations were made.

[44] It is also not clear from the statement of defence and counter-claim and the defence evidence as to when the appellant was expected to accomplish the above enumerated 'obligations'.

[45] The respondent places much importance to these representations such that Tan Sri Chen in cross-examination, conceded that the (alleged) non-performance of these so-called representations on the part of the appellant was the true reason for the nonpayment of the S$1,000,000 to the appellant, and not the alleged invalidity of the contract (and the numerous reasons for so alleging). Yet, it is remarkable that the respondent, in drafting the letter exh. P6, did not consider it either prudent or necessary to incorporate these representations as part of the terms of the contract.

[46] The appellant, however, denies ever making such representations.

[47] In our judgment, evidence of the above alleged representations is inadmissible by reason of ss. 91 and 92 of the Evidence Act 1950. These provisions state:

> **Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**
>
> 91. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of the property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> **Exclusion of evidence of oral agreement**
>
> 92. When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

A Provided that:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution. Want of
B capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not
C inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

D (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement,
E to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;
F

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant
G to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

H

[48] The respondent has not pleaded the existence of any collateral contract.

[49] It is therefore not opened to the respondent by oral
I evidence now to allege the making of the representations by the appellant with a view to vary or to add to the terms of the

agreement exh. P6, which is in writing and signed by the parties (see the Federal Court case of *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] CLJ (Rep) 186).

Section 136 Of The Companies Act 1965

[50] The respondent submits that para. 2.4 of the letter exh. P6 that provides that KRSB and/or FACB would bear all tax charges in respect of the S$1,000,000 payment contravenes s. 136 of the Companies Act; and, hence, the contract is illegal and void by reason of s. 24 and 25 of the Contracts Act. Section 136 states:

> **136. Prohibition of tax-free payments to directors**
>
> (1) A company shall not pay a director remuneration of (whether as director or otherwise) free of income tax, or otherwise calculated by reference to or varying with the amount of his income tax, or the rate of income tax, except under a contract which was in force before the commencement of this Act, and which provides expressly, and not by reference to the articles, for payment of such remuneration.
>
> (2) Any provision contained in a company's articles, or in any contract other than a contract referred to in subsection (1) or in any resolution of a company or of a company's directors for payment to a director of remuneration free of income tax or otherwise calculated by reference to or varying with the amount of his income tax or the rate of income tax shall have effect as if it provided for payment as a gross sum subject to income tax, of the net sum for which it actually provides.
>
> (3) This section shall not apply to remuneration due before the commencement of this Act or in respect of a period before the commencement of this Act.
>
> (4) Where a company contravenes this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for three years or ten thousand ringgit.

[51] Sections 24 and 25 of the Contracts Act provide:

What considerations and objects are lawful, and what not

24. The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Agreements void if considerations and objects unlawful in part

25. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

[52] In our judgment the question of the contract offending s. 136 does not arise in the present case since the appellant was never a director of the respondent company (FACB). Section 136 only applies to income tax-free payments made by a company to its own director. The appellant was appointed as the Executive Deputy Chairman of KRSB and not of FACB. KRSB and FACB are two separate legal entities. It is true that para. 2.4 mentions 'KRSB and/or FACB'. But KRSB is not a party to the contract and therefore the word 'KRSB' is devoid of any legal significance; and, obviously, as a matter of law para. 2.4 is not enforceable against KRSB. Furthermore, under para. 2.3 of the contract it is not KRSB that is obliged to make the S$1,000,000 payment to the appellant; that payment is to be made by the respondent, FACB. The appellant is not enforcing the contract against KRSB. And even then, *vis-à-vis* the respondent (FACB), the appellant is only interested in enforcing that part of the agreement that relates to the payment of the S$1,000,000. He is not interested in enforcing para. 2.4.

Conclusion

[53] We, accordingly, set aside the order of the High Court. Instead, we order that judgment be given in favour of the appellant in terms of prayer 1 of the statement of claim with interest at 8% per annum with effect from 1 January 2001 to date of judgment; and thereafter the 8% statutory interest to follow until date of actual payment.

[54] We award costs to the appellant in the sum of RM20,000, being costs here and below.

[55] (Note: The panel's decision was on 19 January 2011, and our decision was unanimous. However, by the time this draft judgment was ready on 5 September 2011, a member of the panel, Tengku Baharudin Shah Tengku Mahmud JCA, had retired as a Judge of the Court of Appeal.)

[Appeal allowed and cross-appeal dismissed; costs of RM20,000 awarded to the appellant, being costs here and below]